

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS**

IN RE PHARMACEUTICAL INDUSTRY)
AVERAGE WHOLESALE PRICE)
LITIGATION)
_____)

MDL No. 1456

CIVIL ACTION: 01-CV-12257-PBS

THIS DOCUMENT RELATES TO)
ALL CLASS ACTIONS)
_____)

Judge Patti B. Saris

Chief Magistrate Judge Marianne B. Bowler

**PLAINTIFFS' OPPOSITION TO TRACK II DEFENDANTS' REPLY TO
PLAINTIFFS' RESPONSE TO THE TRACK II DEFENDANTS' MOTION
FOR ENTRY OF PROPOSED CASE MANAGEMENT ORDER NO. 13**

Plaintiffs object to the Track II Defendants' Motion To File A Reply In Support Of The Track II Defendants' Motion For Entry Of Case Management Order No. 13 for the reasons set forth below.

At the conclusion of the class certification hearing the Court directed the parties to meet and confer in an effort to agree to a new case schedule and to file a joint or separate statement.

Plaintiffs and the Track I defendants did confer and complied with the Court's order by filing separate submissions on February 24, 2005 and February 25, 2005. The Track II defendants made no effort to meet and confer. Instead, they filed their motion for entry of Case Management Order No. 13. Having failed to comply with the Court's directive they should not be entitled to a reply.

In addition, to ignoring their meet and confer obligations, the Track II defendants' reply makes it clear that they intend to deluge the Court with yet another round of filings relating to class certification. The Court selected five defendants to pave the way for how this litigation might proceed as to other defendants. In connection with the class certification motion the Court has been deluged with submissions from the Fast Track defendants and has received a report from Dr. Berndt. It is inconceivable that any issue that is truly relevant to class certification has not been raised.

Hence plaintiffs proposed a very sensible procedure. As to the Track II defendants, on a shortened schedule, plaintiffs would serve discovery asking what facts existed that suggested that the result should be any different as to these defendants. In their reply defendants protest this procedure, claiming all 22 Track II defendants are entitled to "discovery and motion practice" the same as other civil litigants. Yet nowhere do the Track II defendants indicate why they should need, or be allowed to: (1) repeat the discovery propounded on plaintiffs; and (2) need any additional discovery of third parties beyond the hundred or more subpoenas already issued. Plaintiffs' approach to class certification as to these defendants, rather than being "flatly at odds" with Rule 23, properly takes into account the purpose of phasing. Track II Defendants' approach is setting this Court up for a new round of class certification briefing as if nothing has happened.

As to timing, the Track II defendants' "trigger proposal" would set the Track II case so far off into the future that the proposal should be rejected. Plaintiffs' proposal would have class certification ready for a ruling within 80 days of the Court's decision on the Fast Track defendants. And waiting for a decision from the First Circuit, which might not accept Rule 23(f) review, would unduly delay this case.

DATED: March 10, 2005

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CERTIFICATE OF SERVICE

I hereby certify that I, Steve W. Berman, an attorney, caused a true and correct copy of the foregoing, **PLAINTIFFS' OPPOSITION TO TRACK II DEFENDANTS' REPLY TO PLAINTIFFS' RESPONSE TO THE TRACK II DEFENDANTS' MOTION FOR ENTRY OF PROPOSED CASE MANAGEMENT ORDER NO. 13** to be delivered to all counsel of record by electronic service pursuant to Paragraph 11 of the Case Management Order No. 2, by sending on March 10, 2005, a copy to Verilaw Technologies for Posting and notification to all parties

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